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No. 97-____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners' First Amendment challenge to Virginia Code §§ 24.2-908, 24.2-910, 24.2-1014, and 8.01-620 as an unconstitutional system of prior restraint is ripe, when certain Respondents repeatedly enforced substantively identical predecessor versions of the challenged statutes to enjoin Petitioners' distribution of voter guides in recent Virginia elections, when Respondents expressly reserve their right to do so again, and when the Petitioners allege that the prior injunctions against them chill and deter their core political speech about candidates, issues, and elections.

2. Whether Virginia Code §§ 24.2-908, 24.2-910, 24.2-1014, and 8.01-620, which in combination authorize Virginia state courts to enjoin the distribution of written materials concerning candidates, issues, and elections for alleged election law violations, constitute a system of prior restraints of core political speech that is *per se* unconstitutional under the First Amendment.

3. Whether the *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over damages claims arising out of state court injunctions that were overturned prior to the initiation of the federal action.

4. Whether state court injunctions are legislative rather than judicial acts for purposes of the *Rooker-Feldman* doctrine.

5. Whether the *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over damages claims arising out of *ex parte* state court temporary injunctions.

6. Whether, if the District Court erred in dismissing Petitioners' federal law claims for lack of subject-matter jurisdiction, the District Court abused its discretion under 28 U.S.C. § 1367(c)(3) by dismissing Petitioners' supplemental state law claims.

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Vern T. Jordahl, Mary-Beth LaRock, and the Virginia Leadership Council respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997), and reprinted in the Appendix ("App.") at App. 31-55. The decision of the Court of Appeals affirmed the District Court's decision, which is reported as *Jordahl v. Democratic Party of Virginia*, 947 F. Supp. 236 (W.D. Va. 1996), and reprinted at App. 17-29.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment and opinion on July 28, 1997. On August 11, 1997, Petitioners timely filed a petition for rehearing and suggestion for rehearing in banc, which the Court of Appeals denied on August 22, 1997. App. 56-57.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article III, § 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1257

§ 1257. State courts, certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State

is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367 (reprinted at App. 65-67)

Virginia Code § 8.01-620

§ 8.01-620. General jurisdiction of Circuit Court to award injunctions.

Every circuit court shall have jurisdiction to award injunctions, including cases involving violations of the Uniform Statewide Building Code, whether the judgment or proceeding enjoined be in or out of the circuit, or the

party against whose proceedings the injunction be asked resides in or out of the circuit.

Virginia Code § 24.2-901 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 67-70)

Virginia Code § 24.2-908 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 70-72)

Virginia Code § 24.2-910 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 72-73)

Virginia Code § 24.2-1014 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 73-75)

Virginia Code § 24.1-254.1 (repealed December 1, 1993) (reprinted at App. 75-78)

Virginia Code § 24.1-255(C) (repealed December 1, 1993) (reprinted at App. 78)

Virginia Code § 24.1-277 (repealed December 1, 1993) (reprinted at App. 79-81)

STATEMENT OF THE CASE

In the closing days of Virginia's 1989 and 1993 general elections for Governor, Lieutenant Governor, and Attorney General, as public interest in and attention to those elections peaked, Respondents Democratic Party of

Virginia and Richmond City Democratic Committee (collectively, "Democratic Party") and others, with the active assistance of officials of the Virginia State Board of Elections and pursuant to VA. CODE § 8.01-620, instituted *ex parte* state court temporary injunctions against Petitioners. These injunctions barred Petitioners and others from peacefully distributing their voter guides and other leaflets concerning candidates and issues in the then-imminent elections.[1]

The Democratic Party alleged that Petitioners and others violated §§ 24.1-254.1 and 24.1-255(C) of the Virginia Fair Elections Practices Act (VFEPA), VA. CODE § 24.1-251, *et seq.* (repealed December 1, 1993), by engaging in pamphleteering activities with the purpose of influencing the elections without registering as "political committees" and filing contribution and expenditure reports with the State Board of Elections. The Democratic Party also alleged that Petitioners violated VA. CODE § 24.1-277(B) for failing (in 1989) to include on the voter guides and other leaflets the identity and residence address of the person responsible for the voter guide, and for failing (in 1993) to include a political committee registration number assigned by the State Board of Elections.

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[1] The *ex parte* temporary injunctions were strategically timed to thwart the state-wide distribution of more than a million voter guides in both the 1989 and 1993 elections, even if the injunctions were ultimately overturned on appeal. For instance, in 1993, the Democratic Party obtained its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993. Hundreds of thousands of voter guides were to have been distributed on Sunday, October 24, 1993, at churches throughout Virginia. The Democratic Party issued public statements threatening *non-parties* with prosecution for criminal contempt if they distributed the voter guides during the pendency of the state court's temporary injunction.

Petitioners' voter guides did not expressly advocate the defeat or election of any candidate, and merely explicated the policy positions taken by the major parties' candidates for state-wide and local office. Petitioners' position was that *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976), did not permit the Commonwealth to apply its campaign registration and reporting requirements to such "issue advocacy."

In the two underlying Fairfax County enforcement actions, the *ex parte* temporary injunctions were made permanent after hearings,[2] but thereafter were overturned.[3] In the 1989 City of Richmond enforcement

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[2] In 1989, the Fairfax Circuit Court issued its *ex parte* temporary injunction on Saturday, November 4, 1989, and held a hearing on Monday, November 6, 1989, at which Petitioners were not represented by counsel. At the November 6 hearing, the Circuit Court entered a permanent injunction that was not dissolved until 1994. In 1993, the Fairfax Circuit Court issued its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993, and held a hearing on Wednesday, October 27, 1993, at which Petitioners were represented by counsel. At the October 27 hearing, the Circuit Court entered a permanent injunction that the Virginia Supreme Court dissolved on Monday, November 1, 1993, the day before the election.

[3] The Virginia Supreme Court did not include any reasons with its summary order dissolving the 1993 Fairfax Circuit Court injunction. Petitioners also sought federal relief against the state court judge's enforcement of his injunction, but the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit abstained on the basis of this Court's decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), even though the Fourth Circuit acknowledged that the state court injunction inflicted "substantial irreparable injury" to Petitioners' First Amendment rights. *Family Found., Inc. v. Brown*, 9 F.3d 1075,

action, the Circuit Court's *ex parte* temporary injunction lapsed on its own terms after one week. The court ultimately dismissed that action in 1994 for failure to prosecute. Thus, although the injunctions against Petitioners either lapsed or were overturned in the state court system, the Democratic Party effectively silenced Petitioners' core political speech in the crucial closing days of Virginia's general election campaigns.[4]

Effective December 1, 1993, the Virginia General Assembly repealed the VFEPA and substantively recodified it as the Virginia Campaign Finance Disclosure Act ("VCFDA"), VA. CODE § 24.2-900 *et seq*. The relevant provisions previously applied against Petitioners were recodified with non-material changes.[5]

1076 (4th Cir. 1993) (Luttig, J., Single Circuit Judge).

[4] The Democratic Party's enforcement actions constituted "SLAPPs" (Strategic Lawsuits Against Public Participation). *See* G. Pring & P. Canan, SLAPPs: GETTING SUED FOR SPEAKING OUT 8-11 (1996). One court has described SLAPPS as "suits without substantial merit that are brought . . . to stop citizens from exercising their political rights or to punish them for having done so." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994) (internal quotation marks and citation omitted).

[5] *Compare, e.g,* former VA. CODE § 24.1-254.1 (defining "committees" and requiring such "committees" to register with Board of Elections) *with* VA. CODE §§ 24.2-901 (defining "political committees" as including "committees" under the former law) *and* 24.2-908 (requiring "political committees" and other persons to register with Board of Elections); former VA. CODE § 24.1-255(C) (requiring "committees" to file receipts and expenditure reports with Board of Elections) *with* VA. CODE § 24.2-910 (same); former VA. CODE § 24.1-277(B)(2)(b) (requiring written materials concerning candidates for elective office to identify the

In 1994, the Virginia General Assembly amended the newly-enacted VCFDA to exclude from VA. CODE § 24.2-901's definition of "political committee" organizations holding tax-exempt status under § 501(c)(3) of the Internal Revenue Code. The Petitioners do not fall within this exception.

On October 2, 1995, approximately one month before Virginia's mid-term state legislative elections, Petitioners brought this action against the Democratic Party. Petitioners' First Amended Complaint sought: (1) a declaratory judgment under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 that VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014, when coupled with the injunction enforcement mechanism of VA. CODE § 8.01-620, constitute an unconstitutional system of prior restraint; (2) injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2202 against the Democratic Party's enforcement of the challenged Virginia statutes; and (3) compensatory and punitive damages under 42 U.S.C. § 1983 and state law claims for malicious prosecution, abuse of process, and trespass to chattels. Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4) for their § 1983 claims and under 28 U.S.C. § 1367 for their state law claims.

In a companion action brought on the same day and in the same court, the Virginia Society for Human Life sued various Virginia public officials seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 against VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014 on the grounds that these statutes are unconstitutionally overbroad, both facially and as applied.

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responsible individual(s) and the registration number assigned by the Board of Elections) *with* VA. CODE § 24.2-1014 (same).

See Virginia Soc'y for Human Life, Inc. v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995) ("*VSHL*"), reprinted at App. 1-16. *VSHL* and this action were consolidated as related cases and assigned to the same district judge.

In *VSHL*, the District Court initially recognized that the recodification and amendment of the VCFDA did not materially alter the substantive law, *see* App. 4; 906 F. Supp. at 1073 (characterizing the challenged VCFDA provisions as "similarly worded" to the VFEPA provisions previously enforced by the Democratic Party), and on October 30, 1995, entered a preliminary injunction against Virginia's enforcement of VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014 based on the "chilling effect" caused by the Democratic Party's prior enforcement actions. App. 13; 906 F. Supp. at 1077.

In 1996, during the pendency of this action and *VSHL* in the District Court, the Virginia General Assembly further amended the VCFDA in response to this Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511 (1995) (holding that state statute prohibiting anonymous leafletting was unconstitutional as applied in the context of election referendum). The Virginia General Assembly, apparently relying upon the advice of the Virginia Attorney General, *see* 1995 Va. Op. Att'y Gen. 170, construed *McIntyre* as only applying to political speech concerning *referenda* (as opposed to candidate elections). These amendments (reprinted at App. 58-65), which took effect on July 1, 1996, thus (1) repealed VA. CODE § 24.2-1014's requirement that written material concerning election *referenda* contain an authorization statement identifying the responsible individual; (2) repealed VA. CODE § 24.2-910's requirement that "political committees" and other persons file expenditure reports concerning election *referenda* with the Board of Elections; and (3) repealed the requirement that an individual who

expends more than $500 out of personal funds in statewide election register as a political committee under VA. CODE § 24.2-908. Such persons, however, must continue to file expenditure reports with the Board of Elections pursuant to VA. CODE § 24.2-910.

Like the 1993 recodification and the 1994 amendment, the 1996 amendments to the VCFDA do not prevent the Democratic Party from again enjoining Petitioners from distributing their voter guides in Virginia elections. The VCFDA *still* requires "political committees" engaged in pamphleteering with the purpose of influencing elections to register with the State Board of Elections, to file expenditure and receipt reports with the same state agency, and to identify on political pamphlets the name and residence address of the responsible person, along with the registration number assigned by the Board. These requirements may *still* be enforced by injunctions pursuant to VA. CODE § 8.01-620. Virginia election law, as it has been repeatedly applied against Petitioners, remains substantively *unchanged* since the previous state court enforcement actions undertaken by the Democratic Party, notwithstanding the 1996 amendments.

In the District Court, the Petitioners moved for partial summary judgment with respect to their request for declaratory and injunctive relief under § 1983, and the Democratic Party's liability for damages under § 1983 and certain state law claims. The Democratic Party moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. While these motions were pending, the District Court granted Virginia's motion to intervene to defend the challenged statutes' constitutionality.

On September 30, 1996, the District Court granted the Democratic Party's motion to dismiss for lack of

subject-matter jurisdiction. App. 30. In its opinion, the District Court ruled that Petitioners' "as applied" challenge to the VCFDA and its injunction enforcement mechanism was not ripe because the previous enforcement actions had been undertaken in the name of the now-repealed VFEPA, and because the recodified and amended VCFDA had yet to be enforced against Petitioners. App. 22; 947 F. Supp. at 239 ("A challenge based on the statutes in effect at the time of the plaintiffs' alleged injury would be moot because those statutes no longer exist in the same form, and a challenge based on the current statutes is premature because they have not yet been applied.").[6] The District Court further ruled that Petitioners' First Amended Complaint failed to assert a facial challenge to the challenged Virginia statutes. *Id.*

The District Court also concluded, after raising the issue *sua sponte* in the motions hearing and requesting additional briefing, that under the *Rooker-Feldman* doctrine it lacked jurisdiction over Petitioners' § 1983 damages claims, because any award of damages would necessarily imply that the state courts had erred in issuing the injunctions in question, even though the state courts themselves had dissolved two of the injunctions. App. 25-26; 947 F. Supp. at 240-41. The District Court also held that the state court injunctions were judicial rather than legislative acts for purposes of the *Rooker-Feldman* doctrine. App. 27-28; 947 F. Supp. at 241.

Finally, the District Court dismissed Petitioners' supplemental state law claims pursuant to 28 U.S.C.

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[6] The same District Judge had ruled in the companion *VSHL* case that notwithstanding the recodification and amendment of the VCFDA, the challenged provisions were "similarly worded" to the VFEPA provisions previously enforced against Petitioners. *See* App. 4; 906 F. Supp. at 1073.

§ 1367(c)(3). App. 28; 947 F. Supp. at 241-42. In granting the Democratic Party's motion to dismiss, the District Court did not act upon the Petitioners' fully briefed motion for partial summary judgment.[7]

On July 28, 1997, the Court of Appeals affirmed the District Court's judgment. App. 31-55; *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997). The Court of Appeals held that Petitioners' prior restraint challenge to VA. CODE §§ 24.2-908, 24.2-910, 24.2-1014, and § 8.01-620 was exclusively an "as applied" challenge rather than, as Petitioners contend, an "as applied" *and* facial challenge. App. 42-43; 122 F.3d at 198-99. The court also held that the Petitioners' "as applied" challenge was not ripe, because the challenged VCFDA provisions had never been enforced against them, and because the VFEPA provisions that had been enforced against them had been repealed. App. 40-42; 122 F.3d at 198. In so ruling, however, the Court of Appeals simply ignored Petitioners' contention that the recodification and amendment of the VCFDA did not materially change the substantive law that previously had been enforced against Petitioners.

With respect to the District Court's dismissal of Petitioners' § 1983 damages claims on *Rooker-Feldman* grounds, the Court of Appeals ruled that (1) contrary to Petitioners' argument, the underlying injunctions were judicial, rather than legislative, acts for purposes of the *Rooker-Feldman* doctrine, App. 47-49; 122 F.3d at 200-01; (2) contrary to Petitioners' argument, the *Rooker-Feldman*

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[7] After its dismissal of this case, the same District Court granted Virginia's motion to dismiss the plaintiffs' complaint in *VSHL*, on the grounds that the *VSHL* plaintiffs lacked standing to challenge the statutes in question if the statutes were given a narrow, saving construction. The *VSHL* plaintiffs' appeal is currently pending in the Court of Appeals.

doctrine barred federal jurisdiction over Petitioners' § 1983 damages claims even though the underlying injunctions had been overturned prior to the commencement of the federal court action, App. 49-53; 122 F.3d at 201-03; and (3) because the state courts (eventually) held hearings, and because state law provided for a right of appeal of the *ex parte* temporary injunctions, the *Rooker-Feldman* doctrine barred Petitioners' § 1983 damages claims based on the entry of the initial, *ex parte* restraining orders. App. 53; 122 F.3d at 203 n.11.

Finally, the Court of Appeals held that the District Court's dismissal of Petitioners' state-law claims pursuant to 28 U.S.C. § 1367(c)(3) was not an abuse of discretion. App. 54-55; 122 F.3d at 203.

On August 22, 1997, the Court of Appeals denied Petitioners' timely-filed petition for rehearing and suggestion for rehearing in banc.

REASONS FOR GRANTING THE WRIT

Introduction

The Court of Appeals' decision conflicts with decisions of this Court and other circuits, and involves important questions of federal jurisdiction and First Amendment law that this Court should resolve. In the closing days of Virginia's two most recent gubernatorial elections preceding the commencement of this action, the Democratic Party employed legally indistinguishable predecessor versions of the challenged Virginia statutes to silence Petitioners' core political speech for alleged election law violations. Notwithstanding this pattern of enforcement, the Court of Appeals held, in conflict with decisions of this Court and other courts of appeals, that

Petitioners' prior restraint challenge is not ripe because the enforcement actions were undertaken under a statutory regime that has been recodified and amended, even though the recodification and amendments did not remove or correct the constitutional deficiencies alleged by Petitioners.

On the merits of Petitioners' prior restraint challenge, this case affords this Court the opportunity to declare what its earlier cases implicitly teach, namely, that prior restraints of core political speech are *per se* unconstitutional, rather than merely presumptively unconstitutional. The record demonstrates why it is imperative for this Court to announce such a bright-line rule protecting core political speech. Although injunctions of core political speech may ultimately be overturned on appeal, opportunities for *timely* speech on issues, candidates and elections are irretrievably lost while such appellate remedies are pursued.

This case also presents the Court with the opportunity to decide the important questions of whether the *Rooker-Feldman* doctrine is an absolute bar to federal jurisdiction over damages claims (whether grounded in § 1983, state law, or both) arising out of state court injunctions, even when the underlying injunctions were overturned in the state court system; whether state court injunctions are legislative or judicial acts for purposes of the doctrine; and whether the doctrine bars federal jurisdiction over § 1983 damages claims that arise from *ex parte* temporary injunctions.

I. The Court of Appeals' Holding That Petitioners' Prior Restraint Challenge Is Not Ripe Conflicts with Previous Decisions of this Court and Creates a Conflict in the Circuits.

The Court of Appeals held that Petitioners' First Amendment challenge is not ripe because the prior injunctions were issued to enforce the VCFDA's predecessor statute, the VFEPA, and because the VCFDA itself has been twice amended since it took effect. App. 40-42; 122 F.3d at 198. The Court of Appeals did not dispute Petitioners' contention, however, that the recodification and amendments of the VCFDA did not materially alter the law.

The Court of Appeals' decision squarely conflicts with this Court's decision in *Northeastern Florida Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662, 113 S. Ct. 2297, 2301 (1993). "[R]epealing [a] challenged statute and replacing it with one that differs only in some insignificant respect" does not moot a controversy concerning the statute, because the reenacted statute "disadvantages [the challengers] in the same fundamental way." *Id.* (footnote omitted). Thus, where a challenged statute has been repealed and recodified, for mootness purposes the question is "whether the new [statute] is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues. . . ." *Id.* at n.3. The Court of Appeals' holding also squarely conflicts with the decision of another federal appeals court. *See Rembert v. Sheahan*, 62 F.3d 937, 941 (7th Cir. 1995) ("if the injury of which a plaintiff complains continues even under the amended statute, then the possible issuance of an injunction promises a measure of relief, and a court may act"). The Court of Appeals' opinion ignored its conflicts with these decisions.

A claim for prospective declaratory and injunctive relief against a statute is ripe when there is a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625 n.1, 106 S. Ct. 2718, 2722 n.1 (1986) (citing *Steffel v. Thompson*, 415 U.S. 452, 458-60, 94 S. Ct. 1209, 1215-16 (1974)). *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309 (1979) (challenge to statute is ripe where "there exists a credible threat of prosecution thereunder"). Put another way, when fear of enforcement of "an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id.* at 302, 99 S. Ct. at 2310-11 (citing *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1216). When such a credible threat of prosecution exists, the statute may be challenged *prospectively* "on its face or as applied." *Steffel*, 415 U.S. at 475, 94 S. Ct. at 1224. Thus, whether Petitioners' challenge is deemed "facial" or "as applied," the ripeness inquiry is the same: is there a *"credible threat"* of future prosecution?

The Court of Appeals' decision conflicts with well-settled doctrine, reflected in decisions of this Court and several other circuits, that the *previous* enforcement of a statute establishes a "credible threat" of future prosecution under the statute and, thus, a ripe controversy for prospective declaratory and injunctive relief. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 459 n.7, 107 S. Ct. 2502, 2508 n.7 (1987) (four previous arrests of political activist under statute "lends compelling support to the threat of future enforcement"); *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215-16 ("The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'") (citation omitted); *Valley Broad. Co. v. United States*, 107 F.3d 1328,

1330 n.2 (9th Cir. 1997) (previous enforcement of regulation demonstrated a "reasonable threat of prosecution"); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992) ("It is the enforcement of an allegedly unconstitutional statute, '*past* or immediately threatened,' that causes the injury entitling those in the line of fire to seek judicial relief.") (emphasis added and quoting *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.)); *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 427 (8th Cir. 1988) (plaintiffs had reason to fear enforcement of statute "based upon past experience: members had been arrested and prosecuted" for previous violations); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217 (3d Cir. 1988), *cert. denied*, 488 U.S. 822, 109 S. Ct. 67 (1988) (previous application of ordinance "in a coercive manner" provided "sufficient justification for [plaintiff] to have a reasonable expectation of enforcement of the ordinance against it prospectively").

The Court of Appeals ignored this authority and instead relied upon *Renne v. Geary*, 501 U.S. 312, 111 S. Ct. 2331 (1991), for its conclusion that Petitioners' prospective claims for declaratory and injunctive relief are not ripe. In *Renne*, members of local committees of the state Democratic and Republican parties challenged a California constitutional provision that prohibited political party committees from endorsing candidates for certain offices. This Court held that the committee members' challenge was not yet ripe *because the absence of any prior enforcement attempts against the plaintiffs* showed that there was no "credible threat" of future enforcement of the challenged provision against the plaintiffs. *Renne*, 501 U.S. at 322, 111 S. Ct. at 2339.

Here, unlike in *Renne*, there is an established factual record of construction and enforcement of legally

indistinguishable statutory provisions, and it reveals that not only will Virginia circuit courts issue prior restraints under these provisions, they will do so upon *ex parte* application, notwithstanding well-established doctrine barring *ex parte* restraints of speech. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180, 89 S. Ct. 347, 351 (1968). It is precisely this record of enforcement of the challenged statutes that establishes a "credible threat" of future enforcement, and thus a ripe controversy, for Petitioners' prospective claims for declaratory and injunctive relief.

Moreover, the Democratic Party itself confirmed in the District Court and the Court of Appeals that there is a "credible threat" of future enforcement. Rather than permanently disclaim any future enforcement intentions, the Democratic Party declared "that the Democratic Party will not seek to enforce these laws *without advance notice to the court*." Democratic Party Court of Appeals Brief at 18 (emphasis added). Thus, even today the Democratic Party reserves its asserted right to silence Petitioners' core political speech, so long as it gives "advance notice to the court." *See Babbitt*, 442 U.S. at 302, 99 S. Ct. at 2311 (since "the State has not disavowed any intention of invoking the criminal penalty provision against [violators]," the plaintiffs were "not without some reason in fearing prosecution for violation of the [statute]").

In direct conflict with this Court's decisions, the Court of Appeals' decision requires Petitioners to take their chances and distribute voter guides in Virginia state elections at their peril. Understandably, the Democratic Party's repeated enforcement actions have "chilled and deterred" Petitioners from doing so. First Amended Complaint, ¶ 39. In sum, because the Democratic Party's previous enforcement actions demonstrate a credible threat of enforcement of the challenged statutes, Petitioners'

prospective claim for declaratory and injunctive relief is ripe.

II. This Court Should Decide the Important Question of Whether Prior Restraints of Core Political Speech Are *Per Se* Unconstitutional, Rather Than Merely Presumptively Unconstitutional.

Prior restraint of speech, which is among "the most serious and the least tolerable infringements on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976), "suppresses the precise freedom which the First Amendment sought to protect against abridgment." *Carroll*, 393 U.S. at 181, 89 S. Ct. at 351. Accordingly, "*any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317, 100 S. Ct. 1156, 1162 (1980) (emphasis by the Court).

A presumptively unconstitutional system of prior restraint might be sustained only if the challenged system fits "within one of the narrowly defined exceptions to the prohibition against prior restraints." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S. Ct. 1239, 1247 (1975). While national security interests or incitements to violence in extreme cases might theoretically permit prior restraints, *see Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47-48, 81 S. Ct. 391, 394 (1961) (cataloging possible "exceptional cases" where prior restraints might be permitted), it is incontrovertible that core political speech about candidates, issues, and elections — the target of the system of prior restraints challenged in *this* case — is entitled to the strongest possible First Amendment protection.

Political speech about candidates, issues, and elections "occupies the core of the protection afforded by the First Amendment," *McIntyre*, 514 U.S. at 346, 115 S. Ct. at 1518, and *"[n]o form of speech is entitled to greater constitutional protection. . . ." Id.* at 347, 115 S. Ct. at 1519 (emphasis added). *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72, 91 S. Ct. 621, 625 (1971) (the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"). Because speech on these subjects "is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 216 (1964), the First Amendment here "has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587, 100 S. Ct. 2814, 2833 (1980) (Brennan, J., concurring) (emphasis in original).

As this Court has recognized, timeliness of core political speech is often critical if the speech is to have any value. *See Carroll*, 393 U.S. at 182, 89 S. Ct. at 352 ("It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. *A delay of even a day or two may be of crucial importance in some instances.*") (internal citations omitted and emphasis added). The singular danger of an injunction against core political speech is that even though the injunction might ultimately be invalidated on appeal, it

> will so delay publication as to make the speech untimely and hence valueless for its purpose. *The worst case would be an election-eve attempt by the party in power to enjoin publication of politically damaging information. In such circumstances, even the few days necessary to obtain expedited*

> *appellate review might prove seriously prejudicial to that system of representative government which the First Amendment, above all else, should be thought to undergird.*

John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 433 (1983) (emphasis added).

The record in this case vividly illustrates Professor Jeffries' then-hypothetical. On Saturday, November 4, only three days before the November 7, 1989 general election, the Democratic Party obtained *ex parte* temporary injunctions in Circuit Courts in the City of Richmond and Fairfax County barring Petitioners' distribution of voter guides. As a practical matter, it was impossible to retain counsel and obtain expedited appellate review prior to the November 7 election.

In 1993, the Fairfax County Circuit Court issued its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993. This injunction immediately shut down distribution of hundreds of thousands of voter guides on the second weekend prior to the election, when distribution at Sunday church services was to have been the principal distribution mechanism. On the following Wednesday, October 27, the state court not only refused to dissolve the temporary injunction, it granted the Democratic Party's motion to make it permanent and broaden its scope. On Thursday, October 28, Petitioners sought federal relief, and on Friday, October 29, they appealed to the Virginia Supreme Court, which dissolved the injunction the day before the election. In the meantime, as counsel was retained, legal motions and briefs drafted, and appellate remedies pursued, the injunction had the *"immediate and irreversible sanction," Nebraska Press Ass'n*, 427 U.S. at 559, 96 S. Ct. at 2803

(emphasis added), of silencing core political speech as the election campaign drew to a close.[8]

Because prior restraints of core political speech impose silence when the protection offered by First Amendment is at its zenith, such prior restraints are antithetical to the structural role the First Amendment plays in preserving self-government. This Court should grant certiorari for the purpose of deciding whether the system of prior restraints established by Virginia law and challenged in this case is *per se* unconstitutional under the First Amendment because it permits prior restraints of core political speech – speech which by definition must fall outside the "narrow categories" where prior restraints might be permissible.[9]

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[8] In contrast to violations of a statute, where the unconstitutionality of the statute may successfully be asserted as a defense, under the collateral bar rule an injunction's unconstitutionality provides no defense to a violation of the injunction. *See Walker v. City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824 (1967) (upholding contempt conviction for violations of court order). As one commentator has observed, "[b]ecause of the consequences of the 'collateral bar rule' and the power of contempt of court as a punishment for disobedience of court orders, *judicially imposed prior restraints have an uncommonly potent capacity to infringe on First Amendment rights.*" R. SMOLLA, SMOLLA AND NIMMER ON FREEDOM ON SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.02[2] at 8-16 (1994) (emphasis added).

[9] Although neither the District Court nor the Court of Appeals reached the merits of Petitioners' prior restraint challenge, this Court may reach this purely legal issue if it reverses the Court of Appeals on the threshold ripeness issue. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23, 102 S. Ct. 2690, 2698 n.23 (1982).

Virginia is not the only state plagued by election laws that tempt candidates and political parties to use state court injunctions to gag their opponents at election time. In Wisconsin, state trial courts recently enjoined an issue advocacy group from broadcasting radio and television commercials that discussed the voting records of Wisconsin legislators running for reelection. As in Virginia, the basis for the injunctions were alleged violations of the state election law for failing to register with a state agency. The Wisconsin appellate courts *upheld* the injunctions of core political speech. *See State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc. v. Circuit Court for Dane County*, No. 96-3133-W (Wis. App. 1st & 4th Dist. November 8, 1996). In other states, state court injunctions of core political speech for alleged election law violations have ultimately been overturned on appeal, but only after opportunities for timely speech were irretrievably lost. *See, e.g., Republican Party of Florida v. Florida Elections Comm'n*, 658 So. 2d 653 (Fla. Dist. Ct. App. 1995); *Guste v. Connick*, 515 So. 2d 436 (La. 1987).

These cases demonstrate the necessity for this Court to declare what its cases imply: Prior restraints of core political speech concerning candidates, issues, and elections are *per se* unconstitutional under the First Amendment rather than merely presumptively unconstitutional. Any violations of otherwise constitutional election laws can be addressed after-the-fact with appropriate civil or criminal penalties. *See Southeastern Promotions*, 420 U.S. at 559, 95 S. Ct. at 1247 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.").

III. This Court Should Decide the Important Question of Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over Damages Claims Arising out of State Court Injunctions That Were Overturned in the State Court System.

The Court of Appeals held that the *Rooker-Feldman* doctrine barred federal jurisdiction over damages claims arising out of the underlying state court injunctions, all of which were overturned on direct appeal, vacated, or lapsed prior to the commencement of this action. Under the court's broad holding, a federal court lacks jurisdiction to entertain *any* claim for damages arising out of overturned state court judgments, regardless of whether those claims are grounded in § 1983 or in state law causes of action for malicious prosecution, because "the federal district court would be required to determine that the state courts' decisions were wrong." App. 51; 122 F.3d at 202.

Rooker-Feldman, which is derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct 149 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983), is an "abstention doctrine, under which a party *losing* in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the *losing* party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 2654 (1994) (emphasis added). It is a doctrine of statutory construction, based on the distinction between the appellate jurisdiction of the Supreme Court under 28 U.S.C. § 1257 and the original jurisdiction of district courts under 28 U.S.C. § 1331. *See ASARCo Inc. v. Kadish*, 490 U.S. 605, 623, 109 S. Ct. 2037, 2048 (1989) (*Rooker-*

Feldman is a "construction of 28 U.S.C. § 1257"); *see also Feldman*, 460 U.S. at 476, 103 S. Ct. at 1311.

Because Petitioners *succeeded* in overturning the underlying injunctions, *Rooker-Feldman* does not bar federal jurisdiction over Petitioners' claims for damages. Simply put, there are no *outstanding* judgments or injunctions that would be called into question by Petitioners' prevailing on their § 1983 and state law claims. By definition, the collateral attack or appellate review prohibited by the *Rooker-Feldman* doctrine presupposes an *outstanding* state court judgment or order to be attacked or reviewed. Absent such an *outstanding* state order or judgment, an action for § 1983 damages arising out of an overturned state court order or judgment is within a federal district court's original jurisdiction under 28 U.S.C. § 1331.

This Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), implicitly recognized this exception to the *Rooker-Feldman* doctrine. In *Heck*, an incarcerated plaintiff sought § 1983 damages for his allegedly unconstitutional state court conviction. This Court, citing *Rooker* and other cases that bar federal court collateral attacks on state court judgments, held that such a § 1983 action for damages was analogous to a malicious prosecution claim and could proceed in federal court only if the plaintiff proved that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87, 114 S. Ct. at 2372.

In other words, as Petitioners contended in the District Court and the Court of Appeals, *Heck* permits § 1983 actions based on state court judgments that are

overturned in the state court system prior to the commencement of the federal action. Judge Easterbrook recently put it this way: Under *Rooker* and *Heck*, if a state court judgment is "set aside" in the state court system, a § 1983 damages claim can "then and only then" be asserted "against the persons responsible" for the judgment. *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995).

The District Court in this case ignored *Heck*. The Court of Appeals addressed *Heck* and Judge Easterbrook's dictum in *Homola* as follows:

> In *Heck*, the Court reiterated its view that the *Rooker-Feldman* doctrine does not serve to bar a plaintiff's action that "will *not* demonstrate the invalidity of any outstanding criminal judgment. . . ." The Court stressed, however, that the doctrine will serve as a bar if plaintiff's action requires the district court to *"necessarily imply the invalidity of his conviction or sentence. . . ."* *Heck*, 512 U.S. at 487, 114 S. Ct. at 2372 (emphasis added). Similarly, in *Homola*, the Seventh Circuit reiterated the tenets of the *Rooker-Feldman* doctrine. *See Homola*, 59 F.3d at 650. Neither of those cases stand for the proposition that once a state court decision has been reversed or modified, a federal district court may now pass upon the validity of that judgment, which is precisely what the district court recognized [that Petitioners] sought to do.

App. 49-50; 122 F.3d at 201 (emphasis by the Court, footnote omitted).

What follows is the full passage from *Heck* that the Court of Appeals selectively quoted. Note that the underlined language is what the Court of Appeals quoted, and that the bold-faced language is the dispositive language from the *same sentence* that the Court of Appeals omitted and replaced with an ellipsis:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; **if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated**. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit.

Heck, 512 U.S. at 487, 114 S. Ct. at 2372-73 (footnotes omitted).

Manifestly, in selectively quoting *Heck*, the Court of Appeals omitted the salient language from *Heck* that recognizes the relevant exception to *Rooker-Feldman*. *Heck* is clear: If "the plaintiff can demonstrate that the conviction or sentence has already been invalidated," a § 1983 claim can proceed, even if judgment in favor of the § 1983 plaintiff would "necessarily imply the invalidity of his [since overturned] conviction or sentence." *Id.* Although *Heck*'s holding was in the context of § 1983 damages claims arising out of state court *criminal*

judgments, *Heck*'s rationale applies equally to § 1983 and state law malicious prosecution claims arising out of *civil* judgments that are overturned prior to the commencement of the federal action.

The Court of Appeals' holding cannot be reconciled with this Court's rationale in *Heck* and Judge Easterbrook's dictum in *Homola*. Indeed, under the broad holding of the Court of Appeals, the *Rooker-Feldman* doctrine bars a federal court from exercising jurisdiction over a *state law* claim for malicious prosecution arising out of an overturned state court judgment, because such an action would require the federal court to review the overturned state court judgment. This cannot be the law. This Court should grant certiorari to resolve this important question of federal jurisdiction.

IV. This Court Should Resolve the Conflict in the Circuits over Whether a State Court Injunction is a Legislative or Judicial Act for Purposes of the *Rooker-Feldman* Doctrine.

Rooker-Feldman does not bar federal district court review of state court orders that are "legislative" rather than "judicial" in character. *Feldman*, 460 U.S. at 476-77, 103 S. Ct. at 1311-12. The Court of Appeals in this case held that the underlying state court injunctions were judicial rather than legislative acts. App. 47-49; 122 F.3d at 200-01.

In *Feldman*, this Supreme Court outlined the distinction between a court's "judicial" and "legislative" actions:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.*

Feldman, 460 U.S. at 477, 103 S. Ct. at 1312 (emphasis added) (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69 (1908)). *See also Lathrop v. Donohue*, 367 U.S. 820, 824, 81 S. Ct. 1826, 1828 (1961) ("Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State. . . .") (citation and internal quotation marks omitted); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 258, 55 S. Ct. 197, 202 (1934) (legislation includes "every act . . . to which the state gives sanction, no distinction being made between acts of the state Legislature and other exertions of the state lawmaking power"); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 104, 48 S. Ct. 489, 490 (1928) ("legislation consists of rules having continuing force and intended to be observed and applied in the future; and this regardless of the state agency from which it proceeds").

Applying these principles, at least two federal courts of appeals have observed that state court injunctions are fundamentally legislative in character. *See Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir. 1995) (without deciding the issue, noting that state court "[i]njunctions often do function quite like statutes" for purposes of *Rooker-Feldman* analysis); *Cheffer v. McGregor*, 6 F.3d 705, 708 (11th Cir. 1993), *vacated on other grounds*, 41 F.3d 1421 (11th Cir. 1994) (en banc) (finding state court injunction to be statutory in character); *Henson v. East Lincoln Twp.*

814 F.2d 410, 416 (7th Cir. 1987), *cert. dismissed*, 506 U.S. 1042, 113 S. Ct. 1035 (1993) (injunction that corresponds to a statute for bringing about general compliance with the law is "legislative"). The decision of the Court of Appeals in this case conflicts with these decisions, and this Court should grant certiorari to resolve this conflict in the circuits.

V. This Court Should Resolve the Conflict in the Circuits Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over § 1983 Damages Claims Arising out of *Ex Parte* Temporary Injunctions.

Petitioners alleged that the underlying temporary injunctions were initiated *ex parte*. *See* First Amended Complaint, ¶¶ 25, 34, 50, & 51. In the case of the 1989 and 1993 Fairfax injunctions, *after* the entry of the *ex parte* temporary injunctions, those courts held hearings where Petitioners could be heard and move for the injunctions' dissolution. First Amended Complaint, ¶¶ 40, 60. Because the Respondents' motion to dismiss for lack of subject-matter jurisdiction challenged the facial sufficiency of Petitioners' First Amended Complaint, the Court of Appeals was obliged to accept these allegations as true, construing them most favorably to Petitioners, and not to look beyond the face of the complaint to determine jurisdiction. 2 MOORE'S FEDERAL PRACTICE, § 12.30[4], at 12-38 (3d ed. 1997).

The Court of Appeals held that because two[10] of the state courts (eventually) held hearings where Petitioners had the opportunity to be heard, and because state law provided for a right of appeal of the *ex parte* temporary injunction orders, the *Rooker-Feldman* doctrine barred Petitioners' § 1983 damages claims based on the entry of the initial, *ex parte* restraining orders. App. 53; 122 F.3d at 203 n.11. This decision conflicts with the decisions of other circuits, which hold that *ex parte* state court orders are the proper subjects of collateral attack in federal court, notwithstanding the *Rooker-Feldman* doctrine. *See Homola*, 59 F.3d at 651 (*ex parte* state court orders are "open to limited collateral attack" in federal court); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902, 106 S. Ct. 3269 (1986) (*Rooker-Feldman* does not bar federal action where there was no "full and fair opportunity" to contest state court order); *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996) (*Rooker-Feldman* does not apply "when the plaintiff had no reasonable opportunity to raise his federal claim in state proceedings").

An *ex parte* injunction of speech violates due process and the First Amendment. *Carroll*, 393 U.S. at 180, 89 S. Ct. at 351. Even if there is an after-the-fact opportunity to seek dissolution of the injunction, either by motion or appeal, the Constitution has already been violated because there was no full and fair opportunity to contest the *ex parte* injunction at the outset. This Court should grant certiorari in this case to resolve the important question of whether the *Rooker-Feldman* doctrine precludes a federal district court from providing redress for such constitutional violations.

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[10] In 1989, the Circuit Court for the City of Richmond held no hearing after granting its *ex parte* temporary injunction.

VI. If This Court Should Otherwise Review the Court of Appeals' Decision, This Court Should Also Review the Court of Appeals' Affirmance of the District Court's Dismissal of Petitioners' State Law Claims.

If the District Court's dismissal of the Petitioners' § 1983 claims for lack of federal jurisdiction was erroneous, it is indisputable that the District Court lacked discretion under 28 U.S.C. § 1367(c)(3) to dismiss Petitioners' state law claims. Although this issue is plainly not "certworthy" standing alone, should this Court grant certiorari on the other substantial questions presented, it should grant certiorari on this question as well so that if the decision of the Court of Appeals is reversed in any respect, a remand to the District Court will include a reinstatement of the Petitioners' state law claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

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